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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-295

MARGARET L. POLLARD,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Are there any special and important reasons why this Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit which held, among other things, that the Trial Judge properly admitted into evidence the Coroner's death certificate, the necropsy report and the cause of death memorandum, subject to the limitation that no admitted documents or testimony would be permitted containing a statement of the conclusion as to whether the insured's death was accidental, and that the Trial Judge properly charged the jury with respect to the meaning of accidental death.

COUNTERSTATEMENT OF THE CASE

This is a diversity action in which the plaintiff, Margaret L. Pollard, seeks to recover accidental death benefits on account of the death of her husband, Walter Pollard (Pollard), who was insured under two group insurance policies issued by the defendant, Metropolitan Life Insurance Company (Metropolitan). They each provided coverage for death and certain specified injuries as a direct result, independently of all other causes, of bodily injuries sustained solely through violent, external, and accidental means, and which was not the result of intentional self-destruction or intentionally self-inflicted injury.

Sometime during the night of October 7-8, 1974, Pollard, a resident of Pennsylvania, died at Hampton, South Carolina, from asphyxiation due to aspiration of his gastric contents caused by acute alcohol and drug intoxication. (Tr. 131, 166-167, 249, 364, 418-419).[1] The existence of a fatty liver and areas of coronary arteriosclerosis may also have contributed to his death. (Tr. 364). The post-mortem tests revealed that Pollard's blood contained large quantities of alcohol and three drugs (pentobarbital, propoxyphene, and phenothiazine). The levels of each of these drugs were at least toxic and some of the drug levels were lethal. (Tr. 300, 354, 356, 358, 408, 414). In order to have such high levels of these three drugs in his blood, Pollard probably ingested, shortly before his death, between 80 and 90 capsules and tablets containing these three drugs. (Tr. 353-354, 356, 359-360, 407, 413, 416). A prescription was required to obtain each of these three drugs but the evidence was that none of the medicines known

1. References to the Transcript of the proceedings of the jury trial are cited as Tr. .....

to have been prescribed for Pollard contained any of them. (Tr. 269, 417).

Pollard was insured under two group insurance plans with accidental death benefits of $15,250 (Group Policy No. 17300-G) and $120,000 (Group Policy No. 23214-G). Each of the policies provides benefits if the insured "shall have sustained bodily injuries solely through violent, external and accidental means, and within ninety days thereafter shall have... [died or suffered any specified injury] as a direct result of such bodily injuries independently of all other causes..." Both policies provide that no benefits shall be paid for a loss which is "caused by or resulting from intentional self-destruction or intentionally self-inflicted injury, while sane or insane" or "caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity, or by medical or surgical treatment or diagnosis thereof." Group Policy No. 17300-G also provides that no death benefits shall be paid for death which is "caused wholly or partly, directly or indirectly, by injury entitling him to benefits under any workmen's compensation or occupational disease law or other similar legislation."

The Trial Judge excluded any expert opinions on the question of whether the insured's death should be classified as accidental or as intentional self-destruction. The death certificate, the necropsy report and the cause of death memorandum were admitted subject to the above ruling. The Petition for Writ of Certiorari states on page 11 that Dr. Edberg was permitted to testify that the insured's death was a suicide. This statement is not accurate. Dr. Edberg did testify that the insured could come to a conscious decision whether to take his own life despite a blood alcohol level of .32. (Tr. 350-

351). However, prior to Dr. Edberg's testimony, Dr. Wecht, one of the plaintiff's expert witnesses, was permitted to testify in response to a question posed by the plaintiff's attorney that the insured with a blood alcohol level of .322, did not have the mental capacity to form an intentional, deliberate decision to end his life. (Tr. 253)

The jury returned a verdict in favor of the defendant Metropolitan. Plaintiff's motion for a new trial was denied by the Honorable Herbert P. Sorg. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court and subsequently denied plaintiff's petition for rehearing by the court en banc.

REASONS FOR DENYING THE WRIT

Rule 19 of the Rules of this Court declares that "review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The petition for certiorari seeks review of the following two matters: 1) whether the Trial Judge properly admitted into evidence the Coroner's death certificate, the necropsy report and the cause of death memorandum, subject to the limitation that no admitted documents or testimony would be permitted containing a statement of the conclusion as to whether the insured's death was accidental, and 2) whether the Trial Judge properly charged the jury with respect to the meaning of accidental death. Petitioner has not established any special and important reasons why this Court should grant certiorari to review the decision of the Third Circuit Court of Appeals.

The first matter for which review is sought is an evidentiary ruling by the Trial Judge which was affirmed by the Third Circuit Court of Appeals. It is well established that a trial judge's discretionary determination with respect to the admissibility of evidence is to be sustained unless it is manifestly erroneous or a clear abuse of discretion. *Salem v. United States Lines Co.,* 370 U.S. 31, 35 (1962); *Davis v. Freels,* 583 F.2d 337, 345-346 (7th Cir. 1978); *United States v. Lopez,* 543 F.2d 1156 (5th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977).

Petitioner is asking this Court to review the evidentiary ruling made by the Trial Judge to determine whether his decision to excise the conclusory statements contained in certain documents, that the insured's death was accidental, was manifestly erroneous. The Trial Judge's ruling was a proper exercise of his discretion under either Rule 702 or Rule 403 of the Federal Rules of Evidence.

Rule 702 provides that expert opinions, in the form of either expert testimony or documentary evidence, are admissible only if the Trial Judge determines that those opinions will assist the trier of fact to determine a fact in issue. The Trial Judge properly excluded expert testimony on the question whether the decedent's death was accidental, since this testimony would not have assisted the trier of fact. The Trial Judge properly admitted expert opinions, in the form of either expert testimony or documentary evidence, with respect to the cause of the insured's death and the effect of the large amounts of alcohol and drugs ingested by the insured shortly before his death, since the scientific knowledge of the expert witnesses on these matters would assist

the jury to understand the evidence and determine facts in issue. However, the determination of whether the insured's death was accidental was a nonmedical question which the jury was capable of deciding without the opinions of experts with respect to this matter. *See Lohman v. General American Life Ins. Co.*, 478 F.2d 719 (8th Cir. 1973).

Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . ." As discussed in the opinion of the Third Circuit Court of Appeals the probative value of these documents was slight due to the circumstances surrounding their preparation. The death certificate and the necropsy report were prepared prior to the receipt of the toxicologist's report which revealed an overdose of three drugs. Dr. Brissie, the consulting pathologist, was never requested to investigate the scene of the death and testified that he was unhappy with the local investigation of the case. (Tr. 308). Two partly full pill bottles which were marked as containing prescriptions for Valium and Belladenal (post-mortem tests revealed that the insured's blood did not contain either of these drugs) were found in insured's room at the time of his death, but these pills were never tested by the Coroner of Hampton County, South Carolina. (Tr. 84-86). In addition, the death certificate and cause of death memorandum are contradictory on their face since they each contain the question "how injury occurred" and this was answered only with question marks. The opinions that the death was accidental were mere guesses since the Coroner (death certificate) and Dr. Sigmon (cause of death memorandum) admitted that they did not know how

the injury occurred. The admission into evidence of the conclusions contained in these documents that the insured's death was accidental would have been unfairly prejudicial, since the jury would presume that the persons preparing these documents thoroughly and properly investigated the insured's death in preparing these documents, and they had not done so.

Whether expert opinions are admissible is a matter within the sound discretion of the trial judge. The evidentiary rulings of the Trial Judge have been fully considered and were properly affirmed by the Third Circuit Court of Appeals. Further review of this matter by this Court will serve no useful purpose. There is no important federal question which needs to be settled by this Court. In fact, the petitioner has not cited any decision of any court of appeals which is said to conflict with the decision of the Third Circuit Court of Appeals on the matter of the evidentiary rulings of the Trial Judge.

Petitioner also seeks review of the question whether the Trial Judge properly charged the jury with respect to the meaning of "accidental." On page 12 of the Petition for Writ of Certiorari the petitioner urges this Court to grant the writ of certiorari for the purported reason that the decision of the Court of Appeals in effect overrules *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1933), which abolished the "artificial distinction between accidental means and accidental results." This reason advanced by the petitioner for granting the writ is wholly without merit.

The *Landress* decision did not abolish the distinction between "accidental means" and "accidental result." In fact, the Court held that the death of insured

due to sunstroke, where the insured voluntarily exposed himself to the sun's rays under normal conditions, was not due to "accidental means" as required by the terms of the insurance policy, and therefore recovery under the insurance policy was denied. Justice Cardozo dissented from the opinion of the Court and argued that the distinction between "accidental means" and "accidental result" should be abolished.

The *Landress* decision is of no relevance to the case at bar. *Landress* was decided prior to the case of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Under *Erie* and its progeny the interpretation of an insurance policy in a federal diversity action is determined under the applicable state law.

The essential disagreement as to the jury instruction between the majority and dissenting opinions filed in the Third Circuit Court of Appeals involves the scope of the exclusion from coverage of death or other loss caused by intentional self-destruction or intentionally self-inflicted injury. This is not the same thing as the meaning of accidental in the coverage clause. The insurance policies insured against accidental death and specified injuries accidentally sustained. One of the exclusions in the policies provided that no payment shall be made for death or any other loss which is "caused by or resulting from intentional self-destruction or intentionally self-inflicted injury, while sane or insane."

The dissenting opinion of Judge Adams assumes that the exclusion for intentionally self-inflicted injury was not an exclusion from the coverage for accidental death. On the other hand, the Trial Judge's charge to

the jury, and the majority opinion of the Court of Appeals both assume that it was an exclusion from the accidental death coverage. Which is the correct reading is not now important. If the dissent in the Court of Appeals is correct and the exclusion for intentionally self-inflicted injury is not an exclusion from the coverage for accidental death, plaintiff's counsel failed to call this "error" to the attention of the Trial Judge and to request a clarification of the jury charge in this regard. This failure, under Rule 51 of the Federal Rules of Civil Procedure, precludes plaintiff's counsel from now arguing that the charge was erroneous in this respect. The only exception taken by plaintiff's counsel to the charge was that the Trial Judge refused certain of plaintiff's points for charge. None of plaintiff's points for charge dealt with the scope of this exclusion. Having taken his chances on the verdict and lost, plaintiff's counsel cannot now be heard to accuse the Trial Judge of having committed an error which could have been obviated by an exception timely taken.

The Third Circuit Court of Appeals correctly held that the Trial Judge's charge with respect to the meaning of "accidental" was proper under Pennsylvania law. Petitioner does not advance any other reasons why this Court should grant a writ of certiorari to review this issue. This issue, although important with respect to this particular case, does not present a question of law of general concern or importance which this Court needs to address.

CONCLUSION

It is respectfully submitted that this Court should deny the writ of certiorari, since there are no special or important reasons why this Court should review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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